IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 5, 2007

RANDALL D. LAY v. COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION

Appeal from the Chancery Court for Davidson County
No. 03-3423-IV Richard Dinkins, Chancellor

No. M2005-02245-COA-R3-CV - Filed on July 10, 2007

Inmate appeals the dismissal of his Declaratory Judgment action in which he challenged the constitutionality of an amendment to Tennessee's statutory scheme governing parole eligibility. Finding the amendment is not a violation of the Ex Post Facto clauses of the Tennessee or United States constitutions, and that it does not violate due process, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Randall D. Lay, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter, and Arthur Crownover, II, Senior Counsel, for the State.

OPINION

Randall D. Lay is an inmate incarcerated at the West Tennessee State Penitentiary operated by the Tennessee Department of Correction. He was sentenced to three years incarceration after pleading guilty to theft in September of 1992. He was permitted to serve that sentence through the "Community Alternative to Prison Program," but in March of 1993 he pled guilty to especially aggravated robbery and was given a fifteen year, standard 30% Range 1 sentence to run consecutive to his previous three years, for an effective sentence of eighteen years to be served at thirty percent.

On January 2, 1996, while incarcerated, Mr. Lay was placed in administrative segregation, also known as maximum security or maximum custody, due to having assaulted a member of the prison staff and for his extensive disciplinary history. He remained in maximum custody at the time the briefs were filed in this matter. On June 24, 1997, Mr. Lay had his first appearance before the parole board, which denied his request for parole. When the parole board denied his first request for

parole, Mr. Lay was advised that his next opportunity for a hearing before the parole board would be June 1, 1999.

In the interim, however, on July 1, 1998, the Tennessee General Assembly enacted Chapter 743 of the 1998 Public Acts, which amended the statutory scheme governing parole eligibility. *See* 1998 Tenn. Pub. Acts 353. The amendment, which is at the center of this dispute and of which Mr. Lay complains, was codified in Tenn. Code Ann. §§ 40-28-115(h)(2) and 40-35-501 (1998).[1] Generally stated, the relevant change to the statute provided that inmates who were in maximum custody for disciplinary violations were not eligible for parole while in maximum custody and for a period of two years thereafter. *See* Tenn. Code Ann. § 40-28-115(h)(2).

Following the enactment of the legislation at issue and the denial of his request for parole consideration in 1999, Mr. Lay filed for a Declaratory Judgment in the trial court contending that the amendment violates the "Bill of Pains and Penalties," "Separation of Powers," "Ex Post Facto," "Due Process of Law," and that it contradicts policies of the Tennessee Department of Correction.

The State of Tennessee filed a Motion to Dismiss for Failure to State Claim. The Chancery Court granted the State's Motion and dismissed the action, from which decision Mr. Lay appeals.

STANDARD OF REVIEW

The purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. It does not challenge the strength of the plaintiff's proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *See Pursell v. First American National Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *see also Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002). Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. (emphasis added) *See Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978). Then, such a determination becomes a question of law. Our review of a trial court's determinations on issues of law is *de novo*, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

[1] In his brief, Mr. Lay refers to the legislation at issue as House Bill 2882. Once enacted by the General Assembly as Chapter 743 of the 1998 Public Acts, *see* 1998 Tenn. Pub. Acts 353, it was codified as an amendment to Tenn. Code Ann. §§ 40-28-115(h)(2) and 40-35-501 (1998).

ANALYSIS

Prior to 1998, there was no statutory prohibition on parole eligibility for inmates in maximum custody. The relevant statutes, Tenn. Code Ann. §§ 40-28-115(h)(2)[2] and 40-35-501(i)(2) (1998), which are identical, now provide a statutory prohibition. The two identical statutes state:

> The department of correction shall not certify an inmate for a parole grant hearing, other than an initial grant hearing, if, at the time the department of correction would otherwise have certified the inmate as eligible, the inmate is classified as maximum custody. This decertification shall continue for the duration of the classification, and for a period of two (2) years thereafter.

Tenn. Code Ann. §§ 40-28-115(h)(2) and 40-35-501(i)(2) (1998).

Mr. Lay contends the 1998 enactment of these statutes and their application to him constitute a violation of several vested rights.

We begin our analysis realizing there are two basic and potentially competing principles that directly pertain to several of Mr. Lay's claims. The first principle is that

> maintaining institutional order and discipline in prison is an essential, compelling governmental interest. *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979); *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir.2001); *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir.1996). The administration of a prison is an extraordinarily difficult undertaking, *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2980, 41 L.Ed.2d 935 (1974), and the day-to-day operation of a penal facility is not susceptible to easy solutions. *Bell v. Wolfish*, 441 U.S. at 547, 99 S.Ct. at 1878.

Utley v. Tenn. Dep't of Corr., 118 S.W.3d 705, 712 (Tenn. Ct. App. 2003). As this Court went on to explain in *Utley*:

> The operation of prisons has been entrusted to the Executive and Legislative Branches of government and is within the province and professional expertise of correction officials. *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974); 713 *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974); *Utley v. Rose*, 55 S.W.3d at 563. The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials' judgment, are needed to preserve internal order and discipline and to maintain institutional security, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1977); *Bell v. Wolfish*, 441 U.S. at 548, 99 S.Ct. at 1879; *Jaami v. Conley*, 958 S.W.2d 123, 125

[2]This section is formerly codified as Tenn. Code Ann. § 40-28-115(i).

> (Tenn.Ct.App.1997) (recognizing prison officials' broad authority regarding prisoner classification). Accordingly, the courts consistently decline to substitute their judgment for that of prison officials when it comes to difficult and sensitive matters of prison administration. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 2407, 96 L.Ed.2d 282 (1987).
>
> Preserving institutional order and discipline may require prison officials to adopt rules or policies that limit or reduce the constitutional rights retained by prisoners. *Bell v. Wolfish*, 441 U.S. at 546, 99 S.Ct. at 1878; *Wilson v. Blankenship*, 163 F.3d 1284, 1295 (11th Cir.1998); *McLaurin v. Morton*, 48 F.3d 944, 948 (6th Cir.1995). Prison officials must have the authority to discipline prisoners for violating these rules and policies. *Garrity v. Fiedler*, 41 F.3d 1150, 1153 (7th Cir.1994); *Turner v. Johnson*, 46 F.Supp.2d 655, 663-64 (S.D.Tex.1999). Accordingly, disciplinary proceedings involving infractions of prison rules and policies are within the expected scope of a prisoner's sentence. *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995).

Utley, 118 S.W.3d at 712-13.

The second of the two principles that pertain to claims asserted by Mr. Lay is that inmates "do not shed all their constitutional rights at the prison gates." *Id*. (citing *Wolff v. McDonnell*, 418 U.S. at 555, 94 S.Ct. at 2974).

> While lawful incarceration brings about a necessary withdrawal of many privileges and rights, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 125, 97 S.Ct. at 2537; *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948), prisoners retain a narrow range of constitutionally protected liberty and property interests. *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S.Ct. 3194, 3202, 82 L.Ed.2d 393 (1984); *Hewitt v. Helms*, 459 U.S. 460, 467, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983). Thus, when a prison rule or policy offends a fundamental constitutional guarantee, the courts must discharge their duty to protect a prisoner's basic constitutional rights. *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987); *Utley v. Rose*, 55 S.W.3d at 563 (recognizing that courts may intervene when violations of a prisoner's constitutional rights have been committed "under the cloak of disciplinary or administrative" proceedings).
>
> There is no dispute that the Ex Post Facto Clauses of the federal and state constitutions apply to prisoners in Tennessee's penal institutions. The right not to be subjected to ex post facto laws is not one of the constitutional rights that prisoners lose when they are imprisoned for crime. However, neither the federal nor the state Ex Post Facto Clause should be interpreted to require or even permit the courts to micromanage the endless array of legislative or administrative adjustments to parole policies and procedures. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 508,

> 115 S.Ct. 1597, 1603, 131 L.Ed.2d 588 (1995). The courts must provide prison officials with due flexibility to fashion parole policies and procedures that address the problems associated both with confinement and with release. *Garner v. Jones*, 529 U.S. 244, 252, 120 S.Ct. 1362, 1368, 146 L.Ed.2d 236 (2000).

Utley, 118 S.W.3d at 713.

With these important principles in mind, we will analyze each of Mr. Lay's issues separately.

Ex Post Facto

For a new statute, rule or policy to violate the ex post facto clauses, it must have two characteristics. First, it must be retroactive in the ex post facto sense that it "changes the legal consequences of acts completed before its effective date." *Utley*, 118 S.W.3d at 716 (citing *Weaver v. Graham*, 450 U.S. at 31, 101 S.Ct. at 965). Second, a new statute, rule, or policy must "disadvantage the affected person either by altering the definition of criminal conduct or by increasing the punishment for the criminal conduct." *Utley*, 118 S.W.3d at 716 (citing *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 896 (1997); *California Dep't of Corr. v. Morales*, 514 U.S. at 506 n. 3, 115 S.Ct. at 1602 n. 3; *State v. Pearson*, 858 S.W.2d 879, 882 (Tenn.1993)).

To determine whether the new law increases the punishment for criminal conduct, we must identify what the available punishment for Mr. Lay's offenses was at the time he committed them. This is known as the law annexed to the crime. *See Johnson v. United States*, 529 U.S. 694, 699, 120 S.Ct. 1795, 1800, 146 L.Ed.2d 727 (2000); *see also Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997). The assertion that the new statute, rule, or policy being challenged has the effect of inflicting a greater punishment than the law annexed to the crime when the crime was committed is often the primary issue in ex post facto challenges. *Utley*, 118 S.W.3d at 716 (citing *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 895 (1997)). The statutes and regulations that govern a prisoner's eligibility for parole are considered to be part of the law annexed to a crime when it is committed. *Kaylor v. Bradley*, 912 S.W.2d 728, 732 (Tenn. Ct. App. 1995) (citing *Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981))(other citations omitted).

Where there is a change in a statute, rule, or policy that affects parole or the early release of prisoners, that change may, in certain circumstances, violate the ex post facto clauses. *Utley*, 118 S.W.3d at 716 (citing *Garner v. Jones*, 529 U.S. 244, 250, 120 S.Ct. 1362, 1367 (2000))(other citations omitted). This change in the law only violates the ex post facto clauses, however, "insofar as it retroactively increases the extent of the punishment that could have been imposed on the day the prisoner committed the underlying crime." *Utley*, 118 S.W.3d at 716 (citing 2 Nowak & Rotunda, § 15.9(b), at 678 n. 67). "A new statute, rule, or policy will be deemed to increase punishment if it effectively postpones a prisoner's initial release eligibility date." *Utley*, 118 S.W.3d at 717 (citing *Garner v. Jones*, 529 U.S. at 250, 120 S.Ct. at 1367; *California Dep't of Corr. v. Morales*, 514 U.S. at 507, 115 S.Ct. at 1602).

In *Utley*, Mr. Utley committed his underlying criminal offense[3] in 1986, and at that time the Tennessee Department of Correction policy governing the available punishment for violating prison policy only permitted the loss of sentence credits and imposition of punitive segregation. This policy changed twice during Mr. Utley's incarceration. First, in 1989, the policy changed so that an available punishment included the extension of an inmate's parole eligibility date from 30% to 50%, and this change was applied to Mr. Utley as punishment for escaping from prison in 1989. Second, in 1996, the policy was again changed to allow as punishment for certain rule violations the extension of a sentence from 50% to 80%, and this change was applied to Mr. Utley for a 1997 assault on prison staff.

Mr. Utley argued that he should only be subject to the disciplinary policy that existed at the time he committed his original underlying offense, but we stated that the pivotal question in Mr. Utley's situation was "whether the law in existence when Mr. Utley committed the crimes that led to the sentences he is now serving put him on notice that the length of his incarceration for these sentences could be increased for violating prison disciplinary rules." *Utley*, 118 S.W.3d at 718-719. Importantly, "the only relevant time for determining the adequacy of the notice to the prisoner of the possibility of increased punishment is the date on which the prisoner committed the offense that led to the underlying conviction and incarceration." *Utley*, 118 S.W.3d at 718. Thus, this court in *Utley* reviewed the law in effect in 1986 when Mr. Utley committed his underlying criminal offence, which led to his conviction and incarceration. Upon review of that law, this court noted that

> In 1986, Tenn. Code Ann. § 40-35-501(h) put him on notice that his release eligibility date was "conditioned on ... [his] good behavior" and that violation of disciplinary rules gave the Commissioner the discretion to "defer ... [his] release eligibility date so as to increase the total amount of time ... [he] must serve before becoming eligible for release status." Thus, there can be no dispute that in 1986, Tenn. Code Ann. § 40-35-501(h) put Mr. Utley on notice that the Commissioner possessed the discretionary authority to punish infractions of prison disciplinary rules by deferring his release eligibility date.

Utley, 118 S.W.3d at 719.

As in Mr. Utley's situation, the pivotal question in Mr. Lay's situation is "whether the law in existence when [Mr. Lay] committed the crimes that led to the sentences he is now serving put him on notice that the length of his incarceration for these sentences could be increased for violating prison disciplinary rules." *Utley*, 118 S.W.3d at 718-719. Mr. Lay is presently incarcerated as a result of committing aggravated robbery and pleading guilty to that crime, the resulting sentence for

[3] Mr. Utley was involved in an armed robbery that resulted in death. He was sentenced to two concurrent twenty-two year sentences considered Range 1 to be served at 30%.

which was a fifteen year, standard 30% Range 1 sentence.[4] He committed this offense on September 23, 1992. *See Lay v. State*, No. 03C01-9702-CR-00071, 1998 WL 75367 (Tenn. Ct. Crim. App. February 19, 1998). Thus, because the ex post facto clauses exist as a means "of assuring that an individual receives fair warning of criminal statutes and the punishments they carry," *Utley*, 118 S.W.3d at 717 (citing *Weaver v. Graham*, 450 U.S. at 28-30, 101 S.Ct. at 964-65; *Hock v. Singletary*, 41 F.3d 1470, 1471 (11th Cir.1995)), we must review the status of the law in September of 1992 to determine the law of which Mr. Lay had notice.

At the time Mr. Lay was first sentenced in September of 1992, the statute concerning release eligibility status provided, in part:

> The release eligibility date provided for in this section is the earliest date an inmate convicted of a felony is eligible for parole; such date is conditioned on the inmate's good behavior while in prison. For a violation of any of the rules of the department of correction or institution in which the inmate is incarcerated or while on any release program other than parole, the commissioner or the commissioner's designees may defer the release eligibility date so as to increase the total amount of time an inmate must serve before becoming eligible for parole. This increase may, in the discretion of the commissioner, be in any amount of time not to exceed the full sentence originally imposed by the court, and shall be imposed pursuant to regulations promulgated by the commissioner which give notice of the length of discretionary increases that may be imposed for a violation of each of the rules of the department or institution.

Tenn. Code Ann. § 40-35-501(i)(1992).

Thus, in 1992, when Mr. Lay committed his offense, he was deemed to be aware that bad behavior during incarceration could delay his parole eligibility date and thus increase his incarceration time. Thus, the law annexed to his crimes in 1992 put him on notice that bad behavior in prison could prolong his incarceration time. Tenn. Code Ann. §§ 40-28-115(h)(2) and 40-35-501(l)(2) do not have the effect of extending his incarceration time beyond the full sentence imposed by the Chancellor; they have the effect of delaying his next parol hearing.

Importantly, Tenn. Code Ann. §§ 40-28-115(h)(2) and 40-35-501(l)(2) did not have the effect of delaying Mr. lay's *first* parole eligibility hearing, which this court in *Utley* indicated was an important consideration because "[a] new statute, rule, or policy will be deemed to increase punishment if it effectively postpones a prisoner's initial release eligibility date." *Utley*, 118 S.W.3d at 717 (citing *Garner v. Jones*, 529 U.S. at 250, 120 S.Ct. at 1367; *California Dep't of Corr. v.*

[4] Mr. Lay is actually serving eighteen years because prior to the armed robbery offense, he had committed theft. The theft however, originally resulted in a three year sentence that he was being permitted to serve through a community alternative to prison program. It was the commission of the aggravated robbery that actually resulted in incarceration.

Morales, 514 U.S. at 507, 115 S.Ct. at 1602). Mr. Lay's initial release eligibility date was in 1997, and pursuant to that eligibility, he was afforded a parole hearing on June 24, 1997. The parole board denied him parole at that time.

Due Process

Mr. Lay's due process argument presents a novel, though not convincing, argument that he had a "right to meet the Board of Paroles on June 1, 1999, as was scheduled by the Board on June 24, 1997 . . ." when the board denied his request for parole following his 1997 parole hearing.

The essence of his argument is that the General Assembly's use of the words "shall" and "will" in Tenn. Code Ann. § 40-35-504(a) afforded him a liberty interest in the anticipated June 1, 1999, parole board hearing. Tenn. Code Ann. § 40-35-504(a) provides, "[i]f it is determined that an eligible inmate should not be granted parole, the board shall thereupon inform the inmate, in writing, of the date the inmate will be reconsidered for parole." Tenn. Code Ann. § 40-35-504(a).

Mr. Lay's reliance on the concept of a liberty interest is misplaced. This is because Tennessee does not recognize parole to be a constitutionally protected liberty interest. *Kaylor*, 912 S.W.2d at 733. To the contrary, our courts have held that "[t]he mere possibility of parole is not a constitutionally protected liberty interest."[5] *Kaylor*, 912 S.W.2d at 732 (citing *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7-11, 99 S.Ct. 2100, 2104-05, 60 L.Ed.2d 668 (1979)). Therefore, Mr. Lay's assertion that he has somehow acquired a liberty interest in being paroled is without merit.

Accordingly, Mr. Lay's due process rights were not violated by the enactment of the amendment to the statute.

Bill of Pains and Penalties

Mr. Lay contends that the amendment to the statute constitutes an illegal pronouncement of guilt by the legislature. The claim by Mr. Lay pertains to the now obscure concepts known as a "Bill of Attainder" and a "Bill of Pains and Penalties." A Bill of Attainder is a legislative act "which inflicts punishment without a judicial trial, 'where the legislative body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the forms or safeguards of a trial and fixes the punishment.'" *Cox v. State*, 439 S.W.2d 267, 270 (Tenn. 1969)(other citations omitted). A Bill of Pains and Penalties also pertains to a legislative act. If the punishment inflicted by the legislative act "is less than death" the legislative act is considered to be a Bill of Pains and Penalties. *See Cummings v. Missouri*, 71 U.S. 277, 1866 WL 9452 (U.S.Mo.) (1866).

[5] Although some states have recognized that their parole statutes may create a liberty interest, Tennessee does not recognize a liberty interest in being paroled. *Kaylor*, 912 S.W.2d at 733 (citing *Wright v. Trammell*, 810 F.2d 589, 591 (6th Cir.1987)).

Mr. Lay contends the language at the end of the Act that states, "This act shall become effective on July 1, 1998, the public welfare requiring it" constitutes an unlawful declaration by the legislature that all maximum custody inmates are public safety risks. We find no merit to this assertion.

Conflict between the statute and Tennessee Department of Correction Policy

Mr. Lay contends the statute is invalid because it is in conflict with the stated purpose of the Department's Policies and Procedures concerning inmates in maximum custody. As he explains it, the effect of the statute as amended is to inflict punishment on inmates who find themselves in maximum custody by denying them their parole hearing. Based upon this conclusion, he contends the statute is invalid because the Department's Policies and Procedures define administrative segregation as the "non-punitive segregation of inmates, for control purposes, who are believed to be a threat to the security of the institution, the welfare of the staff, or to other inmates and the community."

We find no merit to this contention because in the event of a conflict between a statute and a department's policy or procedure, the statute prevails. *See Tasco Developing & Bldg. Corp. v. Long*, 368 S.W.2d 65 (Tenn. 1963). Here, Mr. Lay is challenging the validity of the statute, not the validity of the policy. Although Mr. Lay correctly states that administrative policies and procedures cannot be in conflict with statutes on the same subject, his reliance on this legal principle is misplaced because he is challenging the validity of the statute, not the department's policy, and it is the statute that prevails.

Separation of Powers

Mr. Lay has alleged two separate violations of the doctrine of Separation of Powers. First, he contends the amendment amounts to the legislature encroaching on the powers of the judiciary that sentenced him. In this vein he contends the legislature changed the sentence imposed upon him by the court. Second, he contends the amendment amounts to an encroachment on the powers of the executive branch because it dictates who the Board of Probation and Paroles may consider for parole, i.e., only those inmates that are parole eligible and not classified as maximum custody. We find no merit to either contention.

The separation of powers is essential to our form of government; however, it is not absolute, as the aim of the constitutional provision "is not to prevent cooperative action among the three branches of government, but to guarantee a system of checks and balances." *Pace v. State*, 566 S.W.2d 861, 866 (Tenn. 1978). The separation of powers doctrine arises from the precept that "it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct." *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419 (Tenn. 2007) (quoting *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910)). While the doctrine of separation of powers is designed to prevent a single branch from claiming or receiving inordinate power, there is no bar to cooperative action among the

branches of government. On the contrary, "the doctrine necessarily assumes the branches will coordinate to the end that government will fulfill its mission." *Pace*, 566 S.W.2d at 866 (quoting *Brown v. Heymann*, 62 N.J. 1, 11, 297 A.2d 572, 578 (1972)).

Our courts have repeatedly stated that some functions of the three departments of state government are necessarily overlapping and interdependent. *Lavon v. State*, 586 S.W.2d 112, 115 (Tenn. 1979); *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Woods v. State*, 169 S.W. 558 (Tenn. 1914). This is particularly true in our criminal justice system.[6] *Bryant v. State*, No. 01C01-9605-CR-00190, 1997 WL 200556, at *1 (Tenn. Crim. App. April 24, 1997) (citing *Lavon*, 586 S.W.2d 112, 115; *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Woods v. State*, 169 S.W. 558 (Tenn. 1914)); *Childs v. State*, No. 01C01-9604-CR-00164, 1997 WL 200557, at *1 (Tenn. Crim. App. April 24, 1997); *Tollett v. State*, No. 01C01-9605-CR-00180, 1997 WL 200561, at *1 (Tenn. Crim. App. April 24, 1997).

The issues presented are not novel as there have been many challenges brought by defendants or inmates who have argued that legislative enactments violated the separation of powers clauses of the constitutions. In a series of consistent holdings in 1997, our Court of Criminal Appeals repeatedly held that the enactment of a statutory scheme of sentencing, which restricted the discretion of the courts, did not violate the separation of powers clause. *See Jones v. State*, No. 01C01-9604-CR-00155, 1997 WL 578996, at *1-2; *Bryant,* 1997 WL 200556; *Childs*, 1997 WL 200557; *Tollett*, 1997 WL 200561. In a more recent opinion, this Court noted that the operation of prisons has been entrusted to the Executive and Legislative Branches of government. *See Utley*, 118 S.W.3d at 712-13 (citing *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974); *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974); *Utley v. Rose*, 55 S.W.3d at 563).

Neither the federal nor the state constitutions should be interpreted to permit the courts "to micromanage the endless array of legislative or administrative adjustments to parole policies and

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[6] In *Childs*, the court stated:

> On appeal, the Defendant argues that our statutory scheme of sentencing violates the separation of powers clause of the State Constitution. *See* Tenn. Const. art. II, §§ 1 & 2. In sentencing a defendant, the trial judge must first determine the appropriate sentencing range which determines the release eligibility percentage. The Defendant argues that this judicial function encroaches upon the power of the executive branch to determine an inmate's parole eligibility. The Defendant therefore argues that we should strike down our entire sentencing code. We reject the Defendant's argument because we conclude that it has no merit. Some functions of the three departments of state government are necessarily overlapping and interdependent. We believe this is particularly true in our criminal justice system. *See Lavon v. State*, 586 S.W.2d 112, 115 (Tenn.1979); *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn.1975); *Woods v. State*, 130 Tenn. 100, 169 S.W. 558 (1914). Accordingly, we do not believe the judicial function of setting sentencing ranges is an unconstitutional encroachment on the powers of the executive branch.

Childs, 1997 WL 200557, at *1.

procedures." *Utley*, 118 S.W.3d at 713 (citing *California Dep't of Corr. v. Morales*, 514 U.S. 499, 508, 115 S.Ct. 1597, 1603, 131 L.Ed.2d 588 (1995)). This restraint is due in part to the recognition that parole is a privilege, not a right, Tenn. Code Ann. § 40-35-503(b), and there is no constitutional or statutory right to be paroled from a validly imposed sentence of imprisonment. *Utley*, 118 S.W.3d at 713 (citing *Wells v. Tennessee Bd. of Paroles*, 909 S.W.2d 826 (Tenn. Ct. App. 1995); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)).

The Board of Paroles is charged with following the procedures set out by statute for determining parole questions, s*ee Miller v. Tennessee Bd. of Probation and Paroles*, 119 S.W.3d 696, 701 (Tenn. Ct. App. 2003), and where the legislature has created such a privilege, the legislature has the authority to dictate the circumstances under which that privilege may be exercised. The legislature's defining of the factors the Board of Probation and Parole must consider in making a decision about whether to afford an inmate a parole hearing does not encroach upon the Board or the executive branch.

Having examined the record in light of the argument presented by Mr. Lay, we are unable to conclude that the legislature has violated the separation of powers clauses, either by encroaching upon the judicial branch or the executive branch, with the enactment of the amendment at issue. Accordingly, we affirm the trial court in this respect as well.

Illegal Enhancement of a Sentence

For his final issue, Mr. Lay asserts the statute constitutes an arbitrary and illegal sentencing enhancement scheme. As we have previously determined, Mr. Lay has no liberty interest or right to parole or to a parole hearing. *See Kaylor*, 912 S.W.2d at 733 (citing *Wright v. Trammell*, 810 F.2d at 591) (holding that Tennessee does not recognize a liberty interest in being paroled.). Moreover, the amendment to the statute does not constitute a sentence enhancement scheme because no time was added to Mr. Lay's sentence. The only effect of the amendment to the statute was the delay of his eligibility for parole consideration. Accordingly, this issue is also without merit.

IN CONCLUSION

We affirm the judgment of the trial court is all respects and remand this matter to the trial court with costs of appeal assessed against Randall D. Lay.

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FRANK G. CLEMENT, JR., JUDGE